The Central Law Journal.

ST. LOUIS, DECEMBER 2, 1881.

CURRENT TOPICS.

During the past fortnight the public interest of the country has concentred in the trial of Guiteau for the murder of President Garfield. The facts which have been elicited are none of them new. The greatest interest has been manifested in the behavior of the prisoner, and the course pursued by his counsel. Guiteau's demeanor has been extravagant in the last degree, and is characterized throughout by what would be considered in a sane man contempt of court. In spite of repeated threats on the part of the court to have him removed or gagged, he has persisted in interrupting counsel and witnesses, "correcting," as he expresses it, "their errors," and every now and then entering a sort of protest. He has quarreled with his own counsel, insulted witnesses and opposing counsel, defied the court and harangued the audience. This conduct has placed the court in an exceedingly delicate situation. To carry out the threat of removal or gagging would, in a certain sort, indicate that the judge thought his violent behavior all a sham—a clever bit of acting—intended to produce the impression upon the minds of the jury that he is insane, and consequently prejudice his case to some extent in the eyes of the jury. While, on the other hand, to try the case in the face of the running fire of interruptions, protests and speechifying on the part of the prisoner is almost unendurable. To the everlasting credit of Judge Cox it must be said that the conduct of the trial so far is worthy of absolute approbation, more especially when the continued inflamed state of the public mind on the subject is taken into consideration. The perfectly fair and equable way in which he has ruled upon every question under the most trying circumstances, and in the face of a most determined, popular clamor, and an undisguised inclination on the part of the daily press to have the man railroaded to the gallows, is everything that could be desired, and will, in our opinion, earn for him an enviable reputation as a trial judge of no mean judicial qualifications.

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Mr. Scoville's attitude, in a position scarcely less trying than that of the judge, is also worthy of praise. He has come into the case under peculiar and distressing circumstances; and, asking for his unfortunate client no more than what every right-minded man should desire to see accorded as a matter of course, viz., a fair trial and a dispassionate investigation of his mental condition at the time of the commission of the homicide, he has borne himself with such unmistakable ingenuousness towards the court and jury, as to have made a decidedly favorable impression. Mr. Scoville, it is said, is no *criminal lawyer*. If this is so, we believe the fact to be a fortunate one for his case. This is not a case for the successful application of the arts of the Old Bailey. The bar at large are certainly not to be congratulated upon the attitude of shrinking from the defense of a criminal, however detestable and vile the crime, because of the intensity of public feeling against him, in which it has been placed by the peculiar circumstances of this prisoner, and the extreme difficulty which he has experienced in obtaining counsel. But unless we are gravely mistaken in the impression which Mr. Scoville has made, as indicated by the newspaper reports of the trial, he will have cause in after years to congratulate himself as a lawyer upon the fortuitous circumstances which brought about his appearance in these proceedings.

As to the attitude of the lay press in this matter, we hardly know what to say. It is said to be its peculiar prerogative to represent and follow the current of popular feeling, rather than to lead and direct it. If this be so, we trust, for the sake of the honor of the American people, that in this instance it has made a mistake. We hope that in the clamor for the blood of this man, and the indignation and contempt expressed towards his counsel, aroused simply by the fact that he is doing his duty, and the impatience at the delay which judicial forms have interposed to the gratification of their vengeance, the press represents nothing but the rabble in the streets. Of course, no one can for a moment attempt to palliate the crime of murder, whether the victim be of high or lowly degree. But however vile the accused, and, however heinous his offense, he is un-

questionably entitled to a fair and impartial trial before a court of justice rather than in the newspapers. It is unworthy the dignity of a civilized community that there should be an effort made by the press to bring extraneous influences to bear upon the natural course of justice. If the law, allowing the plea of insanity as a defense to the charge of homicide, stands in need of amendment (and we are firmly of the opinion that it does), let these blatant newspapers direct their efforts towards a reform. For in the halls of legislation their influence is legitimate and proper, but the administration of justice should be sacred from their encroachments.

POWERS OF PARTNERS.

II.

In considering the powers which a partner possessed, it was stated in our former article, that he could make a chattel mortgage to secure a debt due from his firm. It becomes necessary to state, now that we are considering the powers which he does not possess, that he can not mortgage the partnership realty.[1] And it makes no difference that the mortgage was made to secure a pre-existing debt of the firm, contracted within the scope of the partnership business.[2] In the case last cited it was held that, while a mortgage on lands could not be foreclosed as to the interest of any person who had not executed it, or assented to, or ratified it, yet it could be foreclosed as to the interest of the person who executed it, though in executing it he may have used the partnership name, reciting that he was a member of the firm. He could not deny that he had an interest in the firm at the date of the execution of the mortgage. It is also settled that he can not make a chattel mortgage for the purpose of securing his own private or individual debts.[3] And if he makes such a mortgage, the other party will not take, though ignorant at the time of the facts constituting the illegality.[4] It has also been held that one partner can not mortgage his undivided interest in a specific part of the property belonging to the firm.[5]

Attention was also called, while considering the powers which partners possessed, to the right of one partner to make and indorse promissory notes, and also to accept bills drawn on the firm. It remains to notice, as among the powers which partners do not possess, that one partner can not, in the name of the firm, make an accommodation indorsement.[6] But one may be authorized by his copartners to make an accommodation indorsement, and this authority may be shown by parol.[7] It is also settled that a partner can not bind his copartner by signing as a surety in the name of the partnership.[8] But authority to bind a firm as sureties upon a note may be established by evidence tending to show that such authority had been habitually exercised in previons transactions with the knowledge of the copartner; and where such authority did not previously exist, the action of the partner in so signing may be afterwards ratified.[9] One partner has no power to bind his copartners by the guaranty of the debt of another,[10] unless it is within the scope of the partnership business.[11] Neither can he accept a bill, merely for the accommodation of a third person.[12] Nor can he bind the firm by a promissory note made in the firm name and for his individual debt, the copartners not having assented thereto, and the payee not being aware of the consideration on which it is founded.[13]

[1] Tapley v. Butterfield, 1 Metc. 515; Arnold v. Stevenson, 2 Nev. 234.

[2] Sutlive v. Jones, 61 Ga. 676.

[3] Smith v. Andrews, 49 Ill. 28.

[4] Binns v. Waddill, 32 Gratt. 538; Rogers v. Batchellor, 12 Pet. 221.

[5] Lovejoy v. Bowers, 11 N. H. 404.

[6] Chenowith v. Chamberlain, 6 B. Mon. 61; Heffron v. Hannaford, 40 Mich. 305; Bowman v. Cecil Bank, 3 Greene, 33; Lang's Heirs v. Waring, 17 Ala. 145; Fielden v. Lahens, 2 Abb. Dec. 111.

[7] Butler v. Stocking, 8 N. Y. 408.

[8] Rollins v. Stevens, 31 Me. 454; Foot v. Sabin, 19 Johns. 154; Laverty v. Burr, 1 Wend. 529: Wilson v. Williams, 14 Wend. 146; Bank of Vergenes v. Cameron, 7 Barb. 143; Whitmur v. Adams, 17 Iowa, 567; Butterfield v. Hemsley, 12 Gray, 226; Andrews v. Planters' Bank, 7 S. & M. 192; Langen v. Hewitt, 13 S. & M. 122; Wagnon v. Clay, 1 Mar. (Ky.) 257; Bank v. Bowen, 7 Wend. 158.

[9] First National Bank v. Breese, 39 Iowa, 640.

[10] First National Bank v. Carpenter, 34 Iowa, 433; Selden v. Bank of Commerce, 3 Minn. 166; Sutton v. Irwine, 12 S. & R. 13; Hamil v. Purvis, 2 P. & W. 177; Sweetser v. French, 2 Cush. 310, 314.

[11] First National Bank of Dubuque v. Carpenter, 41 Iowa, 518.

[12] Beach v. State Bank, 2 Ind. 488; Hibler v. DeForrest, 6 Ala. 92.

[13] Davenport v. Runlett, 3 N. H. 386; Williams v. Gilchrist, 11 N. H. 535; Mauldin v. Branch Bank at Mobile, 2 Ala. 502; Pierce v. Pass, 1 Porter, 232;

But a *bona fide* holder for value of negotiable paper made by one partner for his individual debt, can recover against the firm. [14] One partner can not promise to pay the debt of a third person. [15] No principle of the law of partnership can be considered better settled, or as more generally known, than that one partner can not bind his copartners by the execution of a deed. [16] And it is equally well settled that a deed executed by one partner may bind the partnership, provided the partner executing it was authorized by his copartners, by parol, so to do; or provided they have subsequently assented to the same. [17] So, when a deed is executed in the presence of one partner and with his consent, it is his deed. [18] So, where a lease of partnership realty is made by one partner in the partnership name, without the authority of the copartner, and without his subsequent ratification, it will not pass the interest of such copartner, although a seal may be unnecessary. [19] The reason for this is the fact that as partners they own the realty as tenants in common, and as tenants in common they must devise it as such, although it may be regarded in equity, for some purposes, as partnership property. [20]

In our former article we considered the fact that the admissions made by one partner, while acting within the scope of the partnership business, were competent evidence against the firm; and now in coming to the consideration of the effect which a dissolution of the partnership has upon the power of partners, the question which arises is, whether one partner can, after the dissolution of the partnership, by a promise or an admission, take a case out of the statute of limitations as against his copartners. While there has been a diversity of opinion in relation to this question, it has finally become settled, if a large preponderance of the latest authorities can settle it, that one partner has no such power as against the other. This is the view which the Supreme Court of the United States has taken of the subject, and it prevails in a large number of the States. [21] In a very able opinion recently announced in New Jersey, Chief Justice Beasley giving the decision, the contrary doctrine is enunciated. [22] After showing by a thorough examination of the authorities that the conclusion reached by him was the rule established by a long series of cases, covering a long period of time, and sanctioned by a long line of English and American jurists of the very highest eminence, he declares that the overthrow of it by judicial action is arbitrary and unjustifiable, and does much to shake the confidence of the people in the stability of legal rules. "If partners have ceased to be such by the act of dissolution, and can no longer bind each other in that capacity, they are still joint debtors, and from that connection they are the agents of each other in making payments, and renewing the promise to pay, so as to avoid the effect of the statute of limitations." This doctrine is sustained in the cases cited below. [23] It has been changed by statute in

Knapp v. Norman, 7 Ala. 19; L. F. & M. Ins. Co. v. Treat, 58 Me. 415; Chazournes v. Edwards, 3 Pick. 5; Viles v. Bangs, 36 Wis. 131; Colzhausen v. Judd, 43 Wis. 213; Lansing v. Gaine, 2 Johns. 300; Dob v. Halsey, 16 Johns. 34; Saylor v. Macklin, 9 Iowa, 209; Tould v. Lorah, 75 Pa. St. 155.

[14] Waldo Bank v. Lambert, 16 Me. 416; Emerson v. Harmon, 14 Me. 271; Dudley v. Littlefield, 21 Me. 418; Monroe v. Cooper, 5 Pick. 412; First National Bank v. Morgan, 73 N. Y. 593; Blodgett v. Weed, 119 Mass. 215.

[15] Mo Quewans v. Hamil, 35 Pa. St. 517.

[16] Morgan v. Scott, Minor, 81; Doe v. Tupper, 4 S. & M. 261; Shirley v. Fearne, 33 Miss. 653; Lucas v. Bank of Darien, 2 Stew. 280; Hart v. Withers, 1 P. & W. 285; Massey v. Pike, 20 Ark. 92; Posey v. Bullitt, 1 Blackf. 99; Bent v. Lierlein, 4 Mo. 417; Henry County v. Gates, 26 Mo. 315; Trimble v. Coons, 2 Mar. 376; Drumright v. Philpot, 16 Ga. 424; Morse v. Billew, 7 N. H. 556; Clement v. Brush, 3 Johns. Cas. 180; Van Duesen v. Blum, 18 Pick. 229; Morris v. Jones, 4 Harr. 428; Cummins v. Cassily, 5 B. Mon. 74; Munnely v. Doherty, 1 Yerger, 26.

[17] McCart v. Lewis, 2 B. Mon. 266; Bond v. Aitkin, 6 W. & S. 165; Cady v. Shepard, 11 Pick. 400; Pike v. Bacon, 21 Me. 280; McDonald v. Eggleston, 26 Vt. 154; Smith v. Kerr, 3 N. Y. 144, 150; Skinner v. Dayton, 19 Johns. 513; Herbert v. Hanrick, 16 Ala. 581; Grady v. Robinson, 28 Ala. 289; Gunter v. Williams, 40 Ala. 561; Drumright v. Philpot, 16 Ga. 424.

[18] Lee v. Onstott, 1 Ark. 206.

[19] Dillon v. Brown, 11 Gray, 179.

[20] In note 40 the cases were collected.

[21] Bell v. Morrison, 1 Peters, 351, 370; Newman v. McComas, 43 Md. 70; Tate v. Clements, 16 Fla. 339; Yandes v. LeFavour, 2 Blackf. 371; Kirk v. Hiatt, 2 Ind. 322; Exeter Bank v. Sullivan, 6 N. H. 124; Speake v. White, 14 Tex. 369; Peet v. O'Brien, 5 Neb. 360; Whitney v. Reese, 11 Minn. 138; Steele v. Jennings, 1 McMullen, 297; Belote's Exr's. v. Wynne, 7 Yerg. 534; Muse v. Donaldson, 2 Humph. 166; Helm v. Cantrell, 59 Ill. 524; Van Keuren v. Parmelee, 2 N. Y. 523; Shoemaker v. Benedict, 11 N. Y. 176; Wilson v. Torbet, 3 Stew. 296; Myatt v. Bell, 41 Ala. 222; Levy v. Cadet, 17 S. & R. 126; Searight v. Craighead, 1 P. & W. 135.

[22] Merritt v. Day, 38 N J. Law, 32.

[23] Whitcomb v. Whiting, Doug. 652; Wood v. Braddick, 1 Taunton, 104; Cady v. Shepherd, 11 Pick. 400; Vinal v. Burrill, 16 Pick. 401; Sigourney v. Dru-

Maine, [24] Massachusetts, [25] and in Vermont.[26] The case last cited is an interesting one. It was there held that if a partner, who is the agent of a firm in making disbursements, makes a payment as such agent, upon a promissory note previously given by the firm, it prevents the running of the statute as against all the partners, notwithstanding a provision in the statute that a payment by one joint contractor is not allowed to prevent the running of the statute as against the other. "This," said the court, "is not to be treated as a case where a payment is made by an individual member of a firm, but it was a payment by the entire firm, on their joint account, and out of their joint fund."

It is important to notice the effect which a dissolution of the partnership has upon the power of the partners to make and negotiate commercial paper. After dissolution of the partnership, one partner can not give a note in the name of the firm, even for a pre-existing debt. [27] And if a note has been executed by one partner, in the name of the partnership, and for a partnership debt, but has not been delivered by him until after the dissolution of the firm, it can not bind the partnership, as it can take effect only from delivery, and no authority exists to make the delivery after dissolution. [28] So, after dissolution, no power to indorse a note, in the name of the firm, exists in either partner. [29] But if the indorsee had no notice of the dissolution of the partnership, and took the note in ignorance of that fact, it has been held that he acquires a valid title to the instrument, and that the firm is answerable thereon. [30] And the same principle holds where the note has been executed after dissolution, but the payee received the note without knowledge of this fact. [31] Not only is a partner unable to make a note which may evidence a pre-existing indebtedness, but he can not make a new note for the purpose of renewing an old one. But in a case decided in Missouri, it was held, where the holder of the firm note had agreed with the partnership that the note should be renewed upon part payment at maturity, and a new note given for the balance, that such a note might be given after dissolution by one of the partners in the name of the partnership. [33] And one partner may, after dissolution, negotiate a note in the name of the firm, provided he has been authorized by his copartners so to do; and such authority may be given by parol. [34] But upon the dissolution of a partnership, it frequently happens that the copartners designate one of their number a special agent for winding up the affairs of the firm. When this is done, the question arises whether the liquidating partner is thereby clothed with authority to execute notes, to renew them, or to bind the firm by an indorsement. The rule upon this subject seems to be that he is not so authorized, unless the power is expressly conferred upon him. It has been held that he can not execute a note in the firm name for a pre-existing indebtedness; [35] that he can not renew a note; [36] that he can not bind the firm by an indorsement. [37] And in a case in Nebraska, it is said that after dissolution, no valid draft, acceptance or indorsement can be made by the firm; and it is no authority to do so, if, in the notice of dissolution, any partner is empowered to receive and pay debts of the firm; that it must be done by all of the partners, or one must be especially empowered to do the act. [38]

In Pennsylvania it has been held that after

ry, 14 Pick. 387; Bound v. Lathrop, 4 Conn. 363; Shepley v. Waterhouse, 22 Me. 497; Wheelock v. Doolittle, 18 Vermont, 440; McIntire v. Oliver, 2 Hawks, 209; Brewster v. Hardman, Dudley, 138; Smith v. Ludlow, 6 Johns. 267; Johnson v. Beardsley, 15 Johns. 3; Patterson v. Choate, 7 Wend. 441.

24 See True v. Andrews, 35 Me. 183; Wellman v. Southard, 30 Me. 425.

25 See Peirce v. Tobey. 5 Met. 168.

26 See Carlton v. Mill, 28 Vt. 504.

27 Woodworth v. Downer, 13 Vt. 522; Parker v. Cousins, 2 Gratt. 372; Burr v. Williams, 20 Ark. 172; Lansing v. Gaine, 2 Johns. 300; Montague v. Reakert, 6 Bush, 393; Whitman v. Leonard, 3 Pick. 177.

28 Woodford v. Dorwin, 3 Vt. 82; Parker v. Macomber, 18 Pick. 505; Gale v. Miller, 54 N. Y. 536; Grasswitt's Assignee v. Connally, 27 Gratt. 19.

29 Bryant v. Lord, 19 Minn. 396; McDaniel v. Wood, 7 Mo. 543.

30 Cony v. Wheelock, 33 Me. 366.

31 Dickinson v. Dickinson, 25 Gratt. 321; Taylor v. Hill, 36 Md. 494.

32 Wilson v. Forder, 20 Ohio St. 95; Merritt v. Pollys, 16 B. Mon. 356; Cunningham v. Bragg, 37 Ala. 436.

33 Richardson v. Moies, 31 Mo. 430.

34 Yale v. Eames, 1 Metcalf, 486.

35 Van Valkenburg v. Bradley, 14 Iowa, 108; Kemp v. Coffin, 3 Greene, 190 (being overruled); Hamilton v. Seaman, 1 Ind. 185; Conklin v. Ogborn, 7 Ind. 553; Perrin v. Keene, 19 Me. 355; White v. Tudor, 24 Texas, 639.

36 Palmer v. Dodge, 4 Ohio St. 21; National Bank v. Norton, 1 Hill, 572; White v. Tudor, 24 Texas, 639; Lumberman's Bank v. Pratt, 51 Me. 563.

37 Sanford v. Mickles, 4 Johns. 224.

38 Mayberry v. Willoughby, 5 Neb. 368.

dissolution the liquidating partner can borrow money, on the credit of the late firm, for the purpose of paying its debts.[39] It is held in the same State that the liquidating partner can renew an accommodation indorsement,[40] and that he can bind his copartners by notes in liquidation.[41] It has been held that the power to indorse notes and bills of the firm exists for the purpose of settling up the business of the firm.[42] An indorsement made without authority is ratified where the copartner retains his share of the proceeds of the note with a full knowledge of the facts of the case.[43] In a case in Maine it is said that after dissolution each member has the same power as before to collect, liquidate and settle accounts, and apply the funds and effects to the payment of debts, this power continuing until the concerns of the partnership are closed up.[44]

The rule is that, after the dissolution of a partnership, one partner can not incur any new responsibility in the name of the firm by entering into any new contract whatsoever.[45] Upon dissolution, in the absence of any agreement to the contrary, each may collect debts and receipt for them.[46] And one partner can release a debt, after dissolution, that is due to the firm.[47] So he may lawfully assign to a creditor of the firm a demand due to the partnership.[48] One partner, after dissolution, can transfer or assign a judgment obtained by the partnership, and the title will vest as against his copartner; but he can not bind him by a covenant contained in the assignment that the whole judgment remained unpaid.[49] If one partner, on dissolution of the firm, assigns all his interest in the book debts and demands to his copartner, with power to collect them for his own benefit, he can not afterwards exercise any control over them.[50] But the fact that one partner is insolvent will not prevent him from collecting the firm debts, after dissolution.[51] It seems to be agreed that while each partner has authority to settle partnership debts, yet if it is agreed, upon dissolution, that one partner surrenders this right to his copartner, and one who has notice of this agreement afterwards settles with the partner who surrendered his right to settle, the settlement is not binding on the copartner.[52] Third parties settling with other than the liquidating partner, and having notice, are subject to the equitable rights of the other partner.[53] But if made in good faith, it was held in Vermont that payment to one partner, even against the prohibition of the other, operated as payment of the debt.[54] After a dissolution of the partnership, one partner can not bind the other by a promise to pay a note indorsed by the firm, but from which they have been discharged by want of notice of non-payment.[55] And in a recent case in North Carolina it has been held that, after dissolution, one partner has no authority to waive protest of paper indorsed by the firm.[56] And admissions made by one partner after dissolution are held not conclusive upon the partnership.[57] But declarations made by one partner after dissolution, concerning facts which transpired during the existence of the partnership, and in the regular course of its business, are admissible as against the firm, provided they do not create a new liability.[58] One member of a dissolved partnership has no authority, unless it has been expressly given, to retain an attorney to defend the other members of the late firm, in a suit

[39] Davis' Estate, 5 Whart. 530; Whitehead v. Bank of Piltsburgh, 2 W. & S. 172; McCowin v. Cubbison, 72 Pa. St. 358; Brown v. Clark, 14 Pa. St. 469; Robinson v. Taylor, 4 Pa. St. 242.

[40] McCowin v. Cubbison, 72 Pa. St. 358.

[41] Ward v. Tyler, 52 Pa. St. 393.

[42] Chappell v. Allen, 38 Mo. 213.

[43] First National Bank of Mankato v. Parsons, 19 Minn. 289.

[44] Milliken v. Loring, 37 Me. 408; Knowlton v. Reed, 38 Me. 246.

[45] Bacon v. Hutchings, 5 Bush, 597; Easter v. Farmers' National Bank, 57 Ill. 215; Helm v. Cantrell, 59 Ill. 524; Dunlop v. Limes, 49 Iowa, 178; Simmons v. Curtis, 41 Me. 373; Perrin v. Keene, 19 Me. 355; Hicks v. Russell, 72 Ill. 230; Mauney v. Coit, 80 N. C. 300; Sanders v. Ward, 23 Ark. 242.

[46] Heartt v. Walsh, 75 Ill. 200; Hilton v. Vanderbilt, 82 N. Y. 591; Robbins v. Fuller, 24 N. Y. 570; Gillilan v. Sun Mutual Ins. Co., 41 N. Y. 376.

[47] Morse v. Bellows, 7 N. H. 549; Torrey v. Baxter, 27 Vt. 573.

[48] Milliken v. Loring, 37 Me. 408.

[49] Bennett v. Buchan, 61 N. Y. 225.

[50] Davis v. Briggs, 39 Me. 304.

[51] Heartt v. Walsh, 75 Ill. 200.

[52] Combs v. Boswell, 1 Dana, 475; Clark v. Reed, 31 Leg. Int. 413.

[53] Hilton v. Vanderbilt, 82 N. Y. 591.

[54] Thrall v. Seward, 37 Vt. 573.

[55] Schoneman v. Fegley, 7 Pa. St. 433.

[56] Mauney v. Coit, 80 N. C. 300.

[57] Flowers v. Helm, 29 Mo. 324; Brady v. Hill, 1 Mo. 315; Taylor v. Hillyer, 3 Blackf. 433; Beatty v Ambs, 11 Minn. 331.

[58] Rich v. Flanders, 39 N. H. 305, 338; Mann v. Locke, 11 N. H 246; Curry v. Kurtz, 33 Miss. 24; Loomis v. Loomis, 26 Vt. 198; Hinkley v. Gilligan, 34 Me. 101; Parker v. Merrill, 6 Me. 41.

brought against the partnership.[59] In a case in Iowa it has been held that one partner, after dissolution, is authorized to defend, in the name of the partnership, a suit against the firm, to appeal from the judgment, and to procure sureties on an appeal bond necessary to that end.[60] In the same State it was held, where, upon dissolution of a copartnership, it was stipulated that all unsettled business should be entrusted to one of the partners, and by him arranged for their joint benefit in the same manner as if the firm continued to exist, with power to execute all contracts, and perform all duties necessary to the settlement of its affairs, that such partner could not maintain an action in his own name to recover a debt due to the firm.[61] In a case in Pennsylvania it was held that one partner, on the eve of dissolution, had no power to dispose of the entire property of the firm, and especially when its continued ownership was essential to the prosecution of the business, and that he would be restrained by injunction from so doing.[62] It is settled that, whenever one partner gives actual notice that he will not be holden as partner, he can not thereafter be bound for debts contracted by his copartner.[63] A partnership is not bound by acts of another partnership having a common member.[64]

HENRY WADE ROGERS.

Pennington, N. J.

[59] Hall v. Lanning, 1 Otto, 160; Bowler v. Houston, 30 Gratt. 266.

[60] Gard v. Clark, 29 Iowa, 189.

[61] Sypher v. Savery, 39 Iowa, 258.

[62] Sloan v. Moore, 37 Pa. St. 217.

[63] Monroe v. Conner, 15 Me. 178; Feigley v. Sponeberger, 5 W. & S. 564; Leavitt v. Peck, 3 Conn. 125, 128.

[64] Cobb v. I. C. R. Co., 38 Iowa, 610.

THE RIGHT TO MANACLE PRISONERS.

The question of the right to manacle prisoners, which arose before the Commission of Oyer and Terminer on Wednesday last, is one that has not frequently been the occasion of controversy in modern times. It may, however, occur at various stages of the prisoner's custody—at the time of his arrest, of his committal to gaol, and of his appearing at the bar; and a few words upon the law applicable to each of those contingencies may here be useful.

In the first place, as regards the arrest, we consider that ordinarily, and not merely when the apprehension takes place on mere suspicion (as laid down by Mr. Levinge, "Justice of the Peace"), an unconvicted prisoner ought not to be manacled, unless there is reasonable ground to fear an attempt at escape or rescue; and if without reasonable grounds the prisoner is manacled, the constable would seem to be liable to an action for assault.[1] Neither, in the dubious interval between the commitment and trial, should the prisoner be loaded with needless fetters;[2] and if the gaoler shall imprison a man so straightly by putting him in stocks, or putting more irons upon him than is needful, an action will lie against the gaoler.[3]

Lastly, as to the trial at bar, we apprehend that the prisoner ought not to be hand-cuffed. This question arose in 1867, when the prisoners charged with the Fenian outrage at Manchester were brought in fetters before the police court, when their counsel, Mr. Ernest Jones, having failed in his peremptory demand for the removal of the manacles, went so far as to throw up his brief.[4] But, in our opinion, such a demand could not be insisted upon as of right. That the prisoner ought to be unshackled we doubt not; the custom is so; but it is a matter lying within the discretion of the court. In State v. Kring,[5] indeed, where the prisoner, having on a former trial assaulted a bystander, was brought into court the second time ironed upon his wrists, and the court refused to order the removal of the irons, Bakewell, J., said: "It was no sufficient reason for compelling the prisoner to stand his trial for his life with gyves upon his wrists and his hands bound together. Officers of the court could have been placed around him if he was considered dangerous to by-standers, or he might have been placed in an enclosed space within the bar of the court, as was the English custom. Any proper precau-

[1] Wright v. Court, 4 B. & C. 596; Griffin v. Coleman, 4 H. & N. 265; Smith v. Brears and Beach, 1 Ir. L. T. 611; 2 Hale P. C. 219.

[2] Fleta, Lib. c. 26; Mirror, c. 5, s. 1, n. 54; 4 Bl. Com. 300; 1 Rol. 807, 1; 2 Inst. 381; 1 Hale, P. C. 601; 2 Hawk. c. 22, s. 32.

[3] Fitz. H. Nat. Brev. 93; Dalton, c. 170, s. 13; 1 Ed. III., St. 1, c. 7; 14 Ed. III., St. 1, c. 10; 17 St. Tr. 453.

[4] See 1 Ir. L. T. 603.

[5] 1 Mo. App. 439, affirmed 64 Mo. 591.

tion against escape, or to guard against danger of violence from a prisoner, may be taken during the trial. These may be such as will not deprive his counsel of free communication with him, and will not tend to inflict physical torture upon the prisoner, or to deprive him of the freest use of his limbs and of all his faculties in that moment of extreme jeopardy. But it is certainly not permitted to fetter his hands; and if he is brought into court in irons, he is entitled to have them removed whilst actually on trial; and it is error in the court to refuse to order the prisoner to be unbound." But in a later case, Faire v. State,[6] we find it distinctly held that the right to manacle prisoners during their trial exists, and should be left to the discretion of the court. There the prisoner, who had been convicted of murder, appealed by reason of the court below having ordered his feet to be shackled at his trial. He had threatened that if he were found guilty, he would never come out of the court-house alive, but that he would escape, or that the officers would have to shoot him; and the sheriff knowing his character was persuaded that he would attempt to carry out his threat; on hearing which the judge ordered the sheriff to take any necessary precautions to prevent any attempted escape, but not to place the irons on his hands, nor to allow the jury to see what was done. His counsel asked to have the prisoner's feet unshackled. The court replied that the irons had been placed on the prisoner in consequence of representations made by the sheriff, and proposed to have him sworn as to the cause; but to this course counsel objected, and the shackles were not removed. The Supreme Court refused to reverse the conviction, holding that, while it ought to require an extreme case to justify the placing of shackles or manacles upon a prisoner when undergoing trial, yet whether it is necessary or not should be left to the discretion of the trial court, and can not be reviewed on appeal. An extreme case, certainly, was that which came before the Commission of Oyer and Terminer; yet we wholly approve of the humane determination of Baron Dowse. Peter Dillon, it will be recollected, was indicted for assaulting James Kelly. After a most violent scene, Dillon actually attempted, in the dock, to strike the governor of the jail, whereupon the learned judge ordered that handcuffs should be placed on the prisoner. This was accomplished after violent resistance, the prisoner kicking and striking about him; and then it was resolved to lash him by the hands to the bar of the dock. He then fell on the floor, and appeared as if working in a fit. "Remove him to the cells," said the learned baron; "I will not try him in his present condition at all. Remove him; take the handcuffs off him; let him be taken back to the prison from whence he came; and let the prison officer report to me in the morning his condition. It is impossible that he should be tried in his present violent condition. It is not a proper thing for the ends of justice to carry on the solemn form of a trial in the presence of a man in that state. That man appears to me to be out of his mind." The accused was then with difficulty removed, wrestling with the police and warders as he disappeared, and uttering deep groans. Mr. Sheehan, Grangegorman Prison, stated that when he was stationed at Spike Island, the prisoner was a convict there, and he was very violent. He believed that the fit which the prisoner appeared to have was mere acting. "But," said Baron Dowse, "it would be indecorous in a court of justice to carry on the trial of a man in that condition. I, for one, will never sanction, as a judge, the trial of a prisoner at the bar of a court of justice while he is in irons—never." [7]

The sequel of Dillon's trial, on an indictment charging him with having garroted Kelly, and stolen 7s. from him by violence, is worthy of being placed on record. Not often, indeed, do our tribunals now-a-days, display such scenes as that which was enacted on Friday, October 28th; and the calm and temperate conduct of the learned judge, under circumstances so novel and trying, is all the more remarkable, while his persistence in declining to permit the shackling of the ferocious desperado constitutes a precedent of the strongest character in favor of adopting a like course in other cases. The moment Kelly appeared to give evidence, the prisoner made a rush down the dock, dragging two warders with him and kicking them violently. Three police constables entered the dock, and held

[6] 1 Southern L. J. 348.

[7] See 3 Inst. 34; 1 East, P. C. c. 16, sec. 17; Leach 36; 3 Burr. 1812; 4 St. Tr. 1303; 13 Id. 221; Brit., c. 5

the prisoner while his boots were being taken off; but, notwithstanding all the exertions of his custodians, he twisted and turned in their grasp. He would suddenly rise up, springing from his feet, and then give his head a jerk downwards, and bite at the hands of the warders, and one of the police constables bled profusely from his fingers, so bitten. The prisoner yelled in a frightful manner, and used his head freely, butting the officials. He lay down in the dock, and resembled, by his ferocious conduct, a wild animal. He foamed from the mouth, his eyes glared, he hit at everything that came in his way. This untamable ruffian, who had already been in penal servitude for twelve years, had been watching one of the warders during more than a week, for the purpose of taking his life. But, throughout the trial, the learned judge preserved his patience, and allowed the evidence to proceed, while it was taking five powerful men to keep the infuriated jailbird from the throats of all around. At last, he was found guilty, and sentenced to fourteen years' penal servitude. Baron Dowse then said that, in justification of having tried the prisoner, and the great necessity of trying him at present, he had better say a few words. He was unwilling the other day to have the accused placed in irons, and tried if he could avoid it, and he had avoided it to a certain extent. He had thought the prisoner might have been insane the last day, and he had ordered him to be examined by the prison doctor. Dr. Byrne had come to the conclusion that this man was shamming, and the reason assigned for his shamming was that he was better off as an untried prisoner than a convicted one; and accordingly, he wanted to compel a postponement. The governor, who had known the prisoner in Spike Island, also said that it was all shamming. He (Baron Dowse) had an interview with Dr. Minchan, who had known Dillon for years. Dr. Minchan had seen Dillon and found him quiet, and he had promised the doctor to remain quiet at his trial, so that the doctor took off the handcuffs. He could sentence the prisoner to be flogged; but if he did so, it might be assumed that he did so on account of his violent conduct.

This case, though itself unexampled in its circumstances we should think, may well serve, at all events, to set an example to courts where leniency seems to be too much regarded as incompatible with discretion; for we are afraid Miss Anna Parnell may have had reason enough, at the meeting of the Ladies' Irish National Land League, on Wednesday, for complaining of the handcuffing of untried prisoners, which she called anticipatory punishment by the magistrates. We have already intimated that, in our opinion, fetters or irons, during the preliminary proceedings before sentence, are illegal, except in so far as they may be reasonably necessary for the safe custody of the accused.[8] But, while the general rule seems to be that prisoners should not be fettered at their trial, it has been a question as to what was meant by "trial," and as to where it began and terminated;[9] until in Waite's case,[10] it was decided that the moment a prisoner was arraigned, he could demand to be set free from his fetters, but that the court would not so relieve him till the trial actually began. This seems to be the extent of the rule (not referred to in any recent text-book on Criminal Law within our knowledge), as followed in this kingdom, and also in the United States.[11] But, in our opinion, it is a matter lying within the discretion of the court; and it well may be that the prisoner should have to submit to the condition that he should behave himself civilly and peaceably.[12] We read that, during an argument in the King's Bench in 1765, three convicted highwaymen had to be kept chained together for the safety of all bystanders;[13] and if that safety were to be commonly endangered by desperados like Dillon, it would soon become necessary to adopt the course which the ancient Greeks pursued in cases of treason,[14] and oblige prisoners to plead in chains with a keeper on each side.—*Irish Law Times.*

[8] 2 Inst. 381; 3 Id. 34, 35; 4 Bl. Com., c. 25; Brit. c. 5; Mirror, c. 2, sec. 9; Id. c. 5; Hale, 212; 13 St. Tr. 221.

[9] Laver's Case, 5 St. Tr. 979; 4 Bl. Com., c. 25.

[10] Leach, 36; 1 East, P. C. c. 16, s. 17.

[11] See cases already cited, and People v. Harrington, 42 Cal. 165.

[12] 4 St. Tr. 1303.

[13] R. v. Rogers, 3 Burr. 1812.

[14] Xen. Hell., 1, c. 7.

CONSTITUTIONAL LAW — "DUE PROCESS OF LAW" — CITY TAXES ON FARM LAND.

KELLY v. CITY OF PITTSBURGH.

Supreme Court of the United States, October Term, 1881.

1. In this country and in England, the necessities of government, the nature of the duties to be performed, and custom and usage, have established a procedure in regard to the levy and collection of taxes which differs from proceedings in courts of justice, but which is still due process of law, within the meaning of the Constitution.

2. What part sof a State shall,forlocal purposes, be governed by a county, a town, or a city government, and the character of the land included in each, are matters of detail within legislative discretion.

3. When the taxes levied by a city are clearly for a proper public purpose, and are authorized by the State law, though some of the property assessed be farm land within the city, this court can not say that such a statute deprives the owner of his property without due process of law.

In error to the Supreme Court of the State of Pennsylvania.

Mr. Justice MILLER delivered the opinion of the court:

This case is brought before us by writ of error to the Supreme Court of Pennsylvania.

The plaintiff in error, James Kelly, is the owner of eighty acres of land which, prior to the year 1867, was a part of the township of Collins, in the county of Alleghany, in that State. In that year the legislature of Pennsylvania passed an act by virtue of which and the subsequent proceedings under it, this township became a part of the city of Pittsburgh. The authorities of that city assessed the land in question for the taxes of the year 1874 at a sum which the plaintiff asserts to be enormously beyond its value, and which, he alleges, is almost destructive of his interest in the property. The taxes thus assessed are divisible into two classes, namely: those assessed for State and county purposes by the county of Alleghany, within which Pittsburgh is situated, and those assessed by the city for city purposes.

The laws of Pennsylvania allow an appeal from the original assessment of taxes to a board of revision, and Mr. Kelly took an appeal, with what success does not distinctly appear. The result however,was unsatisfactory to him,and he brought a suit in equity in the court of common pleas of the State to restrain the collection of the tax by the city authorities. There was an answer to this bill, a replication, and the decree was affirmed on appeal by the Supreme Court of the State.

To that judgment of affirmance this writ of error is prosecuted, and the transcript of the record, as the act of Congress requires, is accompanied by assignments of error, seven in number. All of these, except two, have reference to exceptions to the report of the master, in regard to matters of which this court has no jurisdiction. Those two, however, assail the decree of the State court on the ground that it violates rights of the plaintiff guaranteed to him by the Constitution of the United States; and as the same points were relied on in the Supreme Court of the State, it becomes our duty to inquire whether these allegations of error are well founded. They are as follows: First. The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being in violation of the right of complainant, as guaranteed to him by article V. of the amendments to the Constitution of the United States. Second. The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of the rights of complainant as guaranteed to him by article XIV., section 1, of the amendments to the Constitution of the United States.

As regards the effect of the fifth amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal government, and to have no reference to the exercise of such powers by the State governments. See Withers v. Buckley, 20 How. 8; Davidson v. New Orleans, 6 Otto, 97. We need, therefore, give this assignment of error no further consideration. But this is not material, as the provision of section 1, article XIV.. of the amendment relied on in the second assignment of errors contains a prohibition on the power of the States in language almost identical with that of the fifth amendment above referred to. That language is that "no State shall * * * * deprive any person of life, liberty or property without due process of law."

The main argument of counsel for plaintiff in error, the only one to which we can listen, is that the proceeding in regard to the taxes assessed on plaintiff's land does deprive him of his property without due process of law. It is not asserted that in the methods by which the value of plaintiff's land is ascertained for the purpose of this taxation there is any departure from the usual modes of assessment. Nor that the manner of apportioning and collecting the tax is unusual or materially different from those in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings in a court of justice. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been,due process of law.

The tax in question was assessed and the proper

officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is, that the eighty acres of land of the defendant is, and always has been, used as farm land, for agricultural use only, and can not for that reason be subjected to taxation for ordinary city purposes. That to do this is to deprive him of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of this land for taxation is very greatly in excess of its true value. Whether this be true or not we can not inquire here. We have so often decided that we can not review and correct, in this court, the errors and mistakes of the State tribunals on that subject, that we can only refer to those decisions without a restatement of the argument. State Railroad Tax Cases, 92 U. S. 575; Kennard v. Morgan, Ibid. 481; National Bank v. Kimball, 103 U. S. 732; Davidson v. New Orleans, 96 U. S. 97; Kirtland v. Hotchkiss, 100 U. S. 491; Missouri v. Lewis, 101 U. S. 22.

But passing from the question of the administration of the law of Pennsylvania by her authorities, the argument is that the law itself is in conflict with the Constitution in the matter already mentioned. It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the defendant's land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and governed by its authorities and its laws, has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory must be settled so organized into a city, must be one of the matters within the discretion of the legislative body. Whether its territory shall be governed for local purposes by a county, city or township organization, is one of the most usual and ordinary subjects of State legislation. It is urged, however, with much force, that though land of this character, land which its owner has laid off into town lots, but which he insists on using as agricultural land, through which no streets are run or used, can not be, even by the legislature, subjected to the taxes of a city, the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use, or might use them if they choose, while the owner of this land reaps no such benefit. Cases are cited from the higher courts of Kentucky and Iowa, where this principle is asserted, and where those courts have held that farm lands in a city are not subject to the ordinary city taxes. It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States.

We are also referred to the case of the Loan Association v. Topeka, 20 Wall. 362, and the assertion there of the doctrine, that taxation which is not for a public use is an unauthorized taking of private property, though sanctioned by a State statute. We are unable to see that the taxes levied on plaintiff's property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, for water-works —these are the specific taxes found in the list complained of. We think it will not be denied by any one that these are public purposes; purposes in which the whole community have an interest, for which by common consent property owners everywhere in this county are taxed. There are items styled city tax and city buildings, which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. Surely these are all public purposes; and the money so to be raised is for public use. No item of the tax assessed against plaintiff is pointed out as intended for any other than a public use. It may be true that plaintiff does not receive the same amount of benefit from some of these taxes, or from any of them, as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can undertake to adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain the organization? Or to insure in this respect absolute equality of burden and fairness in its distribution among those who must bear it? We can not say judicially that Mr. Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, a State, is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself. The police government, the officers whose duty it is to punish and prevent crime, are paid out of the taxes. Has he no interest in their protection, because he lives further from the court-house and police-station than some others? Clearly, however, these are matters of detail within the legislative discretion, and therefore of power in the law-making body within whose jurisdiction the parties live. This court can not say in such case, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due

process of law. These views have heretofore been announced by this court in the cases of Kennard v. Morgan, 92 U. S. 481; State Railroad Tax Cases, 1d. 575; Kirtland v. Hotchkiss, 100 U. S. 491; McMillan v. Anderson, 95 U. S. 37. In the case of Davidson v. New Orleans, 96 U. S. 97, the whole of this subject was very fully considered, and we think it is decisive of the one before us.

The decree of the Supreme Court of Pennsylvania is affirmed.

CHANCERY PRACTICE—BILL OF REVIEW—PERFORMANCE OF DECREE—EXCEPTION.

DAVIS v. SPEIDEN.

Supreme Court of the United States, October Term, 1881.

It is error for the court to dismiss a bill of review on the ground that the decree has not been performed, where the complainant in the bill of review makes an uncontradicted showing that he was unable, because he was without means and financially embarrassed, to comply with the order of court, which was that he should pay a certain sum of money into court. Such a showing makes a case within the operation of the exception to the rule dispensing with its performance, in case of "poverty, want of assets, or other inability to do it."

Appeal from the Supreme Court of the District of Columbia.

Mr. Chief Justice WAITE delivered the opinion of the court:

This is a bill of review for error apparent on the face of the record, and we think with the court below, that on the merits it presents a case for reversal, because the averments in the original bill were not sufficiently precise and definite to warrant a decree such as was rendered, without proof. The only question, therefore, is whether the court was right in dismissing the bill because the decree had not been performed.

One of Lord Bacon's ordinances "for the better and more regular administration of justice in chancery, to be daily observed, saving the prerogative of the court," was that "no bill of review shall be admitted, or other new bill to change matter decreed, except that the decree be first obeyed and performed," save only where the act decreed to be done would extinguish a party's right at common law. Bacon's Law Tracts, 280. This ordinance is the foundation of the practice not to entertain bills of review until the decree to be reviewed has been performed, or its performance excused; the object being, as was said by Chancellor Kent, in Wiser v. Blachly, 2 Johns. Ch. 290, "to prevent abuse in the administration of justice, by the filing of bills of review for delays and vexation, or otherwise protracting the litigation to the discouragement and distress of the adverse party." That this ordinance was intended for the regulation of procedure rather than to limit the jurisdiction of the court, seems to us apparent, because not only on its face the "prerogative of the court is saved," but as early af 1632, in Cock v. Hobb, 5 Russell, 235, a bill of review having been filed without performance of the decree, the cause was permitted to proceed on giving security for the debt which was decreed to be paid. Afterwards, in 1674, in Savil v. Darrey, 1 Cas. in Ch. 42, where to a bill for the review of a decree for a large sum of money, the rule was pleaded that the defendant ought first to pay the money, before the bill should be brought into court," the Lord Chancellor said, "let him give good security for the money, and we will dispense with the rule." Again, in 1682, in Williams v. Mellish, 1 Vern. 117, where a motion was made that proceedings on a decree be stayed until a bill of review could be heard, it was ordered that the decree should be performed before any bill of review would be allowed, "unless the plaintiff * * * * will swear himself not able to perform the decree, and will surrender himself to the Fleet, to lie in prison until the matter be determined on the bill of review." Afterwards, during the year 1684, in Fitton v. Macclesfield, 1 Vern. 264, on a motion that a bill of review might be admitted without the payment of costs in a former suit, amounting to £150, the plaintiff having made oath that he was not worth £40 besides the matter in dispute, leave was granted him to bring in the bill without the payment, and although, when the bill of review came on for hearing, it was insisted that the order dispensing with the judgment of the costs ought to have been set forth in the bill, and it had not been done, the court passed by the objection without notice, and dismissed the case on its merits. So, in 1685, in Palmes v. Danby, 5 Russell, 240, Danby, the defendant to a bill for the review of a decree for the payment of money, pu in a plea and demurrer, and among other causes of demurrer assigned that "the decree had not been performed by the complainants in review, as ought to have been done by the rules and practice of this honorable court before they can be permitted to bring a bill of review;" but notwithstanding this, the court finally heard the cause and made a decree on the whole matter. These cases clearly show that from the beginning the ordinance was treated as a rule of practice, and questions touching obedience to its requirements were not considered as matters of strict right, but as governed by a sound discretion. Taylor v. Person, 2 Hawks, 300.

Another of the ordinances of Lord Bacon, promulgated at the same time, provided "that no bill of review shall be put in, except the party that prefers it enters into a recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him." Bacon's Tracts, *supra*. This is of the same general character with the other. That provides, that a bill of review shall not be admitted, that is to say, received, un-

til the decree has been performed; and this, that such a bill shall not be put in until the prescribed security is given. Both are administrative rather than jurisdictional. The order for security was as imperative as that for performance; but we think that it would not be seriously claimed that a bill which could be filed as a matter of right, was, while that rule was in force, subject to demurrer if it failed to set forth that a recognizance had been entered into. Undoubtedly a court would strike a bill from the files, if it got there without a performance of the decree, or the security required, unless good cause was shown why it had not been done. That would be a far different thing from dismissing a bill on demurrer for like cause.

We are aware that under another ordinance of Lord Bacon in respect to bills of review for newly discovered matter, and which provides that such a bill "may be grounded by special license of the court, and not otherwise" (Bacon's Tracts, *supra*), it was held by the Master of the Rolls, in Bainbridge v. Baddely, 9 Beav. 546, that a demurrer must be allowed unless such special license is averred, and that this case was followed hesitatingly by the vice-chancellor in Henderson v. Cook, 4 Drewry, 314, because Lord Redesdale had said (Mit. Pl., by Jer. 89), it seemed necessary to state in the bill the leave obtained to file it. Whatever may be said in such cases, which are really only bills in the nature of bills of review, and which can only be filed on special license, we think it clear that as to bills which relate to errors on the face of the decree alone, and which may be filed without leave, no such rule prevails. The filing without performance is in the nature of privilege, not jurisdiction. The courts of some of the States have so treated it (Foreman v. Stickney, 77 Ill. 577), and we are clearly of the opinion that such is the better practice and fully recognized by all the early English cases. Performance does not establish the error, but only makes it the duty of the courts, when called on in a proper way, to inquire as to any errors that may have been committed. Whether the courts will enter on such an inquiry without performance depends upon the exercise of a sound judicial discretion applied to the facts of the particular case.

This brings us to the facts as presented by this record. The bill of review does not aver a performance of the decree or give any excuse for non-performance. It was demurred to, among other things, on this ground. The court below at special term, notwithstanding the demurrer, reversed and vacated the decree in the original cause, and gave the complainant in the bill of review leave to answer instanter, and for that purpose to withdraw the answer filed as an exhibit to the present bill, leaving a copy with the papers. Speiden was also enjoined from prosecuting his suit at law until the final hearing of the original cause. On appeal to the general term it was ordered that Davis be permitted, by a day named, to pay into court the amount due on the decree against him; and if he did, that the decree of the special term be affirmed: but if he did not, that such decree be reversed and the bill of review dismissed. At the appointed time Davis appeared, and by affidavit showed to the court that he was utterly unable to comply with the decree at general term; that he had no means and no possible way by or from which he could raise the money to bring into court, and this because of the great financial embarrassment under which he was then laboring. He consequently asked that the order as entered be modified so as to allow him to amend his bill, or, if that could not be done, that his bill be dismissed without prejudice. This was refused, and, consequently, the decree of the special term was reversed and the bill of review dismissed. In this we think there was error. The injustice of the decree as it stood was manifest on the face of the record, and the showing by the affidavit, which was uncontradicted, clearly brought the complainant in review within the operation of the exception to the rule dispensing with performance in case of "poverty, want of assets, or other inability to do it." Wiser v. Blachly, *supra*.

The decree of the Supreme Court of the district in general term is reversed and the cause remanded, with instructions to affirm the decree at special term and proceed accordingly.

LIBEL — PRIVILEGED COMMUNICATION — ABSENCE OF MALICE.

WALLER v. LOCKE.

English Court of Appeals.

Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then, if he *bona fide* and without malice does tell them, it is a privileged communication.

This was an appeal from the Queen's Bench Division, the judges of which had refused the plaintiff a rule *nisi* for a new trial of the action brought by her against the secretary of the Charity Organization Society for libel. The alleged libel was contained in a report by the committee of the society, and signed by the defendant (founded on a report made to them by one of their officers) and which charged the plaintiff with being a begging-letter writer, and with living extravagantly while she was making appeals for charity. The report also stated that in these letters she was in the habit of greatly exaggerating her delicate state of health, and cast doubt upon a statement in several of the letters that she had been injured by a gas explosion. It went on to say that with one trifling exception she had never attempted to earn her own living, but was dependent on a pension of 25l. a year from the United Kingdom Beneficent Society and the money sent to her in reply to appeals. It

concluded by saying that the society did not recommend assistance to be given her. This information was communicated to a Miss Druce, not a subscriber to the society, who had made inquiries about the plaintiff. The result was that the information was communicated to a Miss Saunders, who had induced some ladies to subscribe to provide an annuity for the plaintiff. Miss Saunders communicated the information to the subscribers, and they withdrew their subscriptions. The plaintiff admitted having written appeals for charity to several persons of position, and having received relief from some of them, but denied all the other charges made against her in the report; while the defendant's case was that the charges were substantially true; that the report was a privileged communication; that there was no evidence of malice; and that the sending of the report to persons asking for information was necessary for the protection of society. The action was tried by Grove, J., who told the jury that, in his opinion, the communication was a privileged one. The questions were put to the jury whether the communication was a libel, and whether there was malice in fact in making it. The jury found a verdict for the defendant. The plaintiff then applied to the Divisional Court (consisting of Grove, J., and Huddleston, B.) for a rule *nisi* for a new trial, on the ground of misdirection by the judge, and that the verdict was against the weight of evidence. The rule was refused.

Tatlock (with whom was *Rose Innes*) now renewed the application, and contended that the report was clearly malicious; and was not a privileged communication, since it contained statements untrue in fact, and which the defendant knew or might have known to be untrue. They referred to Martin v. Strong, 5 Add. & E. 535; Kine v. Sewell, 3 M. & W. 297.

JESSEL, M. R.—I am of opinion that no rule ought to be granted. The application is really founded on the allegation that the communication in question is privileged; for, if it is privileged, it is quite clear that there is no evidence on which the jury could properly have found that there was actual malice. They found that there was none. It appears to me that the communication was privileged. The Charity Organization Society is instituted for the purpose of conferring a great benefit on the public—*viz.*, of protecting charitable and benevolent persons from being the victims of impostors on the one hand, and, on the other hand, of seeking out and recommending to charitable and benevolent persons, who are desirous of assisting those who are deserving of charitable relief, persons of that description. I can not conceive any greater service to persons who are deserving of charitable relief on the one hand, and persons who are desirous of giving it on the other. If, then, a person who is desirous of giving charitable relief, or of recommending persons deserving of it to those who are disposed to give it, goes to the society and asks a question about some person *bona fide*, and the society *bona fide* answers that question, it appears to me the answer is privileged. If the answer is given in the discharge of a moral and social duty, or if the person who gives it believes it to be so, that is enough. It need not even be an answer to an inquiry, but the communication may be a voluntary one. The law is concisely stated by Lord Blackburn (then Blackburn, J.) in the case of Davies v. Snead (23 L. T. Rep. N. S. 126; L. Rep. 5 Q. B. 608), thus: "I think the result of the two judges' opinions in Coxhead v. Richards (2 C. B. 569), which were soon afterwards followed in the case of Blackham v. Pugh (2 C. B. 611), is, that where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then, if he *bona fide* and without malice does tell them, it is a privileged communication." If the secretary of the society believed that Miss Druce was *bona fide* inquiring with the intention of assisting Miss Waller herself, or with the intention of inducing other persons to assist her, it was plainly his duty to tell what he knew. If he *bona fide* believed this, he was justified in giving the information to Miss Druce. I may also refer to the judgment of Lindley, J., in the case of Robshaw v. Smith (38 L. T. Rep. N. S. 423), in which he says: "I think it would be a lamentable state of the law if, when a person asks another for information, that other could not give such information as he possessed without exposing himself to the risk of an action. The law on this point seems to me to have been perfectly well settled for a long time. Mr. Smith was under no duty to speak, it is true; but he was entitled to say what he knew if he chose to do so. There could be no such thing as confidential communication between man and man, if such an action as this was to lie. The case of Davies v. Snead, *supra*, quite bears out this." It appears to me that if you ask a question of a person who you believe to have the means of knowledge about the character of another person with whom you wish to have any dealings whatever, and he answers *bona fide*, that is privileged communication. I might illustrate this by the instances of inquiries being made of a friend or a neighbor about a tradesman, a doctor, or a solicitor. Society could not go on without such inquiries. The whole doctrine of privilege must rest upon the interest and necessities of society. If every one was open to an action for libel or slander for the answers he might make to such inquiries, it would be very injurious to the interests of society.

BRETT, L. J.—I am of the same opinion. The question of privilege is for the judge, not the jury, and I gather from what has been stated that Grove, J., did not leave that question for the jury; he intimated to them that the communication was privileged. The questions left to the jury were (1) whether this writing was a libel, and I suppose the jury found that it was. The second question was whether there was malice in fact, and the jury must be taken to have found that there was not. It is immaterial whether there was justification of

the libel—*i. e.*, whether it was true—if the occasion was privileged and there was no malice in fact. Was, then, this communication a privileged one? I think that the definition given by Blackburn, J. in the case of Davies v. Snead, is the best that could be given; it left out the misleading word "duty." The question is whether the facts of the present case bring it within that rule; and I am of opinion that they do,if the person who was asking the question would reasonably be supposed by the defendant to be asking it, in order to be able to form an opinion whether charitable relief should be given or continued to a supposed recipient of it. It is not necessary that the question should have been really asked for that purpose, if the defendant reasonably supposed that it was. It is difficult to suppose, however, that any person would make an application to such a society for any other purpose. The defendant might have reasonably believed that the question was asked by Miss Druce for that purpose. If so, were the society so situated that it became right in the interests of society for them to give the information? It appears to me that they were, and therefore the case comes within the rule that the occasion was privileged. If that is so, the question of malice in fact was properly left to the jury. I should have been very much astonished if the jury had found that there was malice in fact, and very much inclined to set aside their verdict.

COTTON, L. J. — The principal question is whether the occasion was privileged. I think the occasion is privileged whenever a communication is made in answer to an inquiry which the person of whom it is made believes to be made by a person who has some interest in the matter, and if he believes that he is making the communication in discharge of a duty legal, moral or social. It is, no doubt, an imperfect obligation, but it is the duty of every one to do that which it is right in the interest of the public should be done. "Right" is as difficult a word to define as "duty." With that explanation I agree with Brett, L.J. I am of opinion that the case falls within the rule. The communication was privileged, and the only question is whether the jury were right in finding that there was no malice in fact. In order to set aside the verdict of a jury on such a question, the court must be satisfied that they could not have reasonably found as they did. Hence I am satisfied that the finding was reasonable.

Appeal dismissed.

MURDER IN FIRST DEGREE — PREMEDITATION — DELIBERATION.

STATE. v ROBINSON.

Supreme Court of Missouri, October Term, 1881.

1. There can be no murder in the second degree without premeditation. State v. Curtis, 70 Mo. 594, reaffirmed.

2. Where there is testimony from which the jury might infer that the killing took place under such circumstances as to make it either murder in the first or second degree, or manslaughter in the fourth degree, it is error in the trial court to refuse or fail to give appropriate instructions on these offenses.

Appeal from Clinton Circuit Court.

HOUGH, J., delivered the opinion of the court:

The defendant was indicted for murder in the first degree, and was convicted of murder in the second degree. It is unnecessary to state the facts. The court gave, among others, the following instructions: "(3) If the jury find from the evidence that the defendant feloniously, wilfully and maliciously, and not deliberately and premeditatedly, shot and killed Thomas J. Robinson they will find him guilty of murder in the second degree." Instruction No. 8, given for the State, is to the same effect. These instructions do not conform to the definition of murder in the second degree laid down in State v. Curtis, 70 Mo. 594. It was distinctly stated in the opinion in that case, that there can be no murder in the second degree without premeditation, a word which has uniformly been defined by this court—since the statute classifying murders has been in force in this State—to mean, "thought of beforehand for any period of time, however short." Premeditation is a necessary constituent of murder in the second degree, as there can be no murder in the second degree which was not murder at common law, and there could be no murder at common law, unless the act causing death was committed with malice aforethought, that is, with malice and premeditation. This statement, which is substantially the same as that embodied in the opinion in State v. Curtis, *supra*, does not mean that the death itself must have been premeditated in order to constitute murder in the second degree. Both the act causing death and its natural consequence, the death, may, in some cases, be premediated; but, in all cases, it is essential that the act causing death should be premeditated in order to constitute murder in the second degree. The legislature certainly did not intend the words "premeditated" and "deliberate" to be construed as meaning precisely the same thing. The simple fact of the employment of both words, apart from other considerations, shows that one of them was intended to have a larger signification than the other, and this larger signification has, in recent cases by this court, been assigned to the word deliberate. State v. Wieners, 66 Mo. 11; State v. Curtis, 70 Mo. 594. The distinction thus drawn between murder in the first and murder in the second degree, is a rational and just one; one which can be observed in practice, because in harmony with that discriminating sense of right, which, in calm times, will always control the juries of any enlightened and law-abiding community in the enforcement of the criminal law. This distinction is well illustrated in the case put in State v. Wieners, *supra*, p. 25. We will instance substantially the same case: If A and B, being

friends, should casually meet upon the street, and, in the course of a conversation, which gradually assumes the character of a heated controversy, A should, in apparent anger, apply to B some degrading epithet, or impute to him some act of criminal baseness, and B, stung to madness by the insult, should, upon the instant, strike and kill A with some deadly weapon, this would undoubtedly be murder; but under the classification made in the Curtis case, it would be murder in the second degree. The act causing death would have been intentional; and as no act can be intentional unless it be previously thought of, it would therefore have been premeditated; B would be held to have intended the natural consequences of his act; from the fatal use of the deadly weapon the law would imply malice; there was no lawful provocation, and, consequently, no technical heat of passion; in short, the killing would have been a wilful killing with malice aforethought, that is, with malice and premeditation; but it would not fill the measure of the definition of murder in the first degree, because it would not also be deliberate. And it would be against our common sense of right and the presumable intent of the legislature, that a murder so committed should be visited with the same punishment which the law inflicts for a murder committed by lying in wait or by poison. The provocation being insufficient in the eye of the law to reduce the killing to manslaughter, yet being such as would naturally rouse the passions and excite the mind, would prevent the homicide from reaching the highest grade of murder.

The only direct testimony in the case at bar, as to the manner in which the deceased was killed, was the testimony of the defendant himself, and that tended to show that it was accidental. The killing took place in an upper hall-way of a dwelling house, in which the defendant and deceased, who were brothers, resided together, and there was no witness to the difficulty. But there was other testimony from which the jury might have inferred that the killing took place under such circumstances as would have made it either murder in the first degree or second degree, or manslaughter in the fourth degree. State v. Edwards, 70 Mo. 480. For the error committed by the court in defining murder in the second degree and in failing to give an instruction as to manslaughter in the fourth degree, the judgment will be reversed and the cause remanded.

The other judges concur.

CONTRIBUTORY NEGLIGENCE— CONTINUED USE OF DEFECTIVE APPLIANCES.

MARSH v. CHICKERING.

Supreme Court of New York, October 28, 1881.

A continued use by the employee of defective apparatus, with a knowledge of the defect, will not, *per se*, amount to contributory negligence, if it appear that he continued such use, relying upon the promises of the employer made from time to time, that the defect should be remedied; but it is for the jury considering all the circumstances to declare whether or not he was guilty of contributory negligence.

Appeal from an order dismissing the complaint, the exceptions to be heard in the first instance at the General Term.

A. R. Dyett, for appellant; *Spencer C. Doty*, for respondent.

BRADY, J., delivered the opinion of the court:

The plaintiff was in the employment of the defendants, and it was a part of his duty to light two lamps outside of the building known as Chickering Hall, and at the entrance thereof. Upon the trial he testified that the first ladder used by him was a new one, which became "wet and frosty" lying under the stoop, and broke while he was using it; that, upon the night of this occurrence, he met Mr. Charles F. Chickering, one of the defendants, and told him that he had met with an accident, stating what it was, and suggested to him that he ought to have another ladder with hooks on it; to which Mr. Chickering responded, "Yes, I think so, too; and you had better go down and see Mr. Burrill, the superintendent, and tell him to get another ladder, and have it hooked as you want it, hooked at the top and spiked at the bottom." It appears further that the plaintiff made the communication to Mr. Burrill, as instructed by Mr. Chickering, two or three times, and requested that the new ladder, which had been bought by order of Mr. Chickering by Mr. Burrill, should be hooked and spiked, and that Mr. Burrill promised to do as he was requested in this regard. It further appears that the plaintiff used the new ladder the first night it arrived, and without spikes or hooks, but complained of it to Mr. Burrill, who again promised to have it hooked and spiked, Mr. Burrill expressly promising that he would have it attended to. The plaintiff contrived to use this ladder until, it appears, on a very stormy night—described by him as a terrible night—when it was blowing, raining, snowing and sleeting, he went outside to light the lamps, which, it would seem, was necessary, because there was an entertainment to be given in the hall on that night. It was about five minutes before seven. He succeeded in lighting seven out of the eight burners of the south lamp, and, on lighting the eighth burner, the ladder slipped with him and he fell and broke his leg. And it appears that the ladder slipped because there was nothing to hold it; in other words, it was not hooked and spiked, or either, as contemplated by the promise which was made to the plaintiff by Mr. Chickering and Mr. Burrill, the latter of whom, it would seem, was the person selected to do the work as the superintendent. The case contains also the evidence of experts that hooks and spikes, on ladders used for the purpose of lighting lamps similar to those at the hall of the defendanss, are necessary to keep them firm, and, inferentially, to prevent accidents such

as that which occurred to the plaintiff. The plaintiff testified also, in relation to the subject, that when the promise was made to him by Mr. Burrill that the ladder should be fitted with hooks and spikes, he believed that it would be done, and relied upon the promise and continued to use the ladder.

When the plaintiff rested, the counsel for the defendant moved to dismiss the complaint upon the following grounds, *viz.*:

First. That the injury alleged in the complaint was occasioned by the negligence of the plaintiff.

Second. That the injury alleged in the complaint did not happen from the negligence of the defendants.

Third. That the injury to the plaintiff happened by an act to which the plaintiff contributed, and to which the defendants in no way contributed.

Fourth. That the alleged injury to the plaintiff was not caused solely by the neglect of the defendants.

Fifth. That the defendants never instructed the plaintiff to use the ladder.

Sixth. That the plaintiff used the ladder of his own volition, and in the exercise of his own judgment and discretion, without any instructions or suggestions from the defendants.

Seventh. That the defendants are not liable, for the reason that the plaintiff was specially employed by the defendants, and the plaintiff therefore assumed to act for himself, and chose the methods by which he should perform his work.

Eighth. That the plaintiff had the same means that the defendant had of knowing that the ladder was unsuitable and defective.

The motion was granted and the plaintiff duly excepted. The counsel for the plaintiff asked to go to the jury both on the question of the negligence of the defendants and the plaintiff's contributory negligence, which motion was denied, and an exception to such denial duly taken.

The principles enunciated in the case of Lansing v. The N. Y. C. RR. (reported in 49 N. Y. 521), are applicable to and controlling upon the question presented for the consideration in this appeal. Among other expressions used by the court in the elaborate opinion of Folger, J., we find the summary of a rule applicable to actions of this character, namely: "And where a servant knows as fully as the master of the existence of that which is at least the producing cause of the injury, and continues, without promise of amendment of the defect, of his own accord in the master's employ, exposed to the effects when they shall come, it may constitute contributory negligence on his part to remain thereafter in the service," the learned justice citing a number of cases of which this rule is predicated. And it was held in that case that, although the plaintiff knew that Westman, the person who was superintending the erection of the scaffolding upon which he was to work, was drunk on the day the scaffold was finished, and although it might be negligence for the plaintiff to remain in the employment of the defendant subject to the direction of Westman and liable to evil results from work done under his supervision, which was liable to be an insufficient and negligent supervision, from his perception being clouded and dulled by drink, yet, nevertheless, the question of contributory negligence to the injury received was a question for the jury. And the case of Holmes v. Clark (10 W. R. 405) was approved, in which it was held that there is a formidable distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under promise that the same shall be remedied.

And this proposition seems to be sustained by the case of Hough v. The Texas, etc. R. Co. (9 Reporter, 193), and to be recognized by Mr. Cooley in his work on Torts (p. 559), in which, upon the authority of cases cited, he states the rule to be that if the servant, having a right to abandon the service because it is dangerous, refrains from doing so, in consequence of assurances that the danger shall be removed, the duty to remove is manifest, imperative, and the master is not in the exercise of ordinary care, unless, or until, he makes his assurances good. Moreover, the assurances remove all ground for argument that the servant, by continuing the employment, engages to assume the risk.

The adjudications are sufficient to sustain the legal conclusions that the continuance of the use of the ladder by the plaintiff, after promises on the part of the defendants that it should be so constructed as to remove the pending danger, was not *per se* negligence on his part, although it might be so declared by the jury upon a consideration of all the surrounding facts and circumstances, and that whether it was or not is a question to be submitted to the jury. It is fairly inferrible, from the nature of the plaintiff's employment and from the character of the defendants' hall, that the lighting of the lamps was a necessity in the transaction of their business and must be done; and as it was the plaintiff's duty under his employment to do it, it must be done by him and the danger assumed. He seems to have been impressed with the necessity of having guards placed upon the ladder, and as soon as that condition was attained, and which seems to have been after the first accident related by him, he advised the defendants and received promises that the protection suggested should be furnished in the improvement of the ladder, with the design to accomplish its greater safety. He continued to discharge his duties under the promise, under protest as it were, because he rested upon the belief that the defendants would discharge the duty they owed him, and whether under the circumstances he voluntarily accepted the danger was a question about which the jury might or might not entertain any doubt.

The circumstances referred to should all have been submitted to the jury for their consideration, under the authorities, and it was an error therefore to take the question from the jury. It was a right of the plaintiff to have them pass upon it and to determine it either for or against the plaintiff, as well as the defendants' negligence in omitting to do what the latter had admitted was necessary for the security of the plaintiff in the discharge of the duties of his employment.

For these reasons we think the complaint was improperly dismissed, the exceptions well taken, and a new trial should be ordered, with costs to abide the event.

All concur.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MISSOURI.

June, 1881.

MURDER IN SECOND DEGREE—PREMEDITATION—HEAT OF PASSION—REFUSAL TO GRANT CONTINUANCE.—On a trial on an indictment for murder in the first degree, the court gave instructions which declared: 1st. "By the term 'deliberately' is meant in a cool state of the blood, not in that heated state which the law denominates 'passion;' and the passion here meant is not that which comes of no cause, but that, and only that, which is produced by lawful provocation." 2d. "And if from the evidence you find that the defendant actually did the killing complained of, and find that it was not done deliberately; or if deliberately, not premeditatedly, and that it was done at the City of St. Louis, and in the manner and by the means alleged in the indictment, then you ought not to convict him of murder in the first degree, but ought to convict him of murder in the second degree." These instructions are not in harmony with the definitions and doctrine on these subjects as laid down in a number of recent cases in this court. State v. Wieners, 66 Mo. 13; State v. Curtis, 70 Mo. 594; State v. Sharp, 71 Mo. 218; State v. Sims, 71 Mo. 538; and State v. Robinson, decided at October term, [*ante*, p. 434] 1881. The phrase "heat of passion," as used in the above authorities in this connection, is not used in its technical sense, but to denote a condition of mind contra-distinguished from that cool state of the blood implied in the use of the term deliberation; and the passion there referred to is not limited to that heated state which comes from and is produced only by some legal provocation, as seems to be stated in the latter part of the above definition in this case, which is somewhat faulty and calculated to mislead. According to all the authorities above cited, "premeditation" is an essential element of every murder in the second degree. The above instruction, it would seem, allows a conviction without that element, which is not the law. The opinion of the court of appeals, reversing that of the criminal court for error in overruling defendant's application for continuance approved. Judgment of Court of Appeals affirmed. Opinion by RAY, J.; SHERWOOD, C. J., and NORTON, J., dissenting.—*State v. Lewis.*

COMPETENCY OF JUROR—OPINION AS TO GUILT OR INNOCENCE.—A *venire* man who, upon his examination touching his qualification as a juror answers that he has formed an impression or opinion as to the guilt or innocence of the accused, that such opinion has been formed either from rumor or newspaper reports, or both, which it would require evidence to remove, is not an incompetent juror, provided it further appears to the satisfaction of the court that such opinion will readily yield to the evidence in the case, and that such juror, notwithstanding such opinion, will determine the issue upon the evidence adduced at the trial, free from prejudice or bias. Baldwin v. State, 12 Mo. 223; State v. Rose, 32 Mo. 346; State v. Core, 70 Mo. 491; State v. Brown, 71 Mo. 454; State v. Barton, 71 Mo. 288; Reynolds v. United States, 98 U. S. 145; Meyers v. Commonwealth, 79 Pa. St. 308; Curley v. Commonwealth, 84 Pa. St. 151; Balbo v. People, 80 N. Y. 484; Cox v. People, 80 N. Y. 500; State v. Lawrence, 38 Ia. 51; People v. State, 94 Ill. 299; State v. Medlicott, 9 Kan. 257; O'Connor v. State, 9 Fla. 215; People v. Welch, 49 Cal. 174; People v. King, 2, Cal. 507; Ogh v. State, 33 Miss. 383; Carson v. State, 50 Ala. 134; Thomas v. State, 36 Tex. 315; Jackson v. Commonwealth, 23 Gratt. 919. The court did not err in deciding a *venire* man, who stated on his examination that "his father was a second cousin to defendant's mother," was incompetent as a juror. Revised Statutes, sec. 1894. Affirmed. Opinion by NORTON, J.; RAY, J. and SHERWOOD, C. J., concurring; HOUGH and HENRY, JJ., dissenting.—*State v. Walton.*

MECHANIC'S LIEN — EVIDENCE — DECLARATIONS OF CONTRACTOR TO MATERIAL MAN — VALUE OF MATERIALS—LIABILITY OF OWNER OF PROPERTY IMPROVED.—An action by D to enforce a mechanic's lien against a lot and building in Kansas City, owned by appellants, H and L, the latter of whom contracted with E to erect the building. The evidence tended to show that part of the lumber bought by E was not used in the building, though purchased by him for that purpose. The court, for plaintiff, declared the law to be "that the declarations of E or his foreman at the time of the purchase of the lumber sued for, as to the purposes for which it was purchased, are competent evidence to show where the same was used;" and "that if the evidence showed that E was a contractor with H and L to erect the building, then he was their agent, with authority to bind the building for a lien to the extent of the value of the material necessary to complete it." *Held*, error. The relation of principal and agent is not established by the statute between the owner of the real estate and the contractor. If the latter were the agent of the former, not only the

property improved would be subject to the lien of the material man, but the owner would be personally liable for the debt. Simmons v. Carrier, 61 Mo. 581; Morrison v. Hancock, 40 Mo. 561 overruled. Where the price agreed on between the contractor and the material man is *prima facie* evidence of the value of the material, it is not conclusive. The statute does not give a lien for the contract price, but for the "materials;" and if the contractor is not the agent of the owner of the lot, the extent of the lien is the market value of the materials when furnished. An instruction asked by the defendant declaring that plaintiff's lien was good only for such materials purchased of plaintiff as were actually used in the building, stated the law as well settled in this court, and was improperly refused. Fitzpatrick v. Thomas, 61 Mo. 516; Schulenberg v. Prairie Home Ins. Co., 65 Mo. 205. Reversed and remanded. Opinion by HENRY, J.—*Deardorff v. Evarhartt.*

SUPREME COURT OF KANSAS.

October 18, 1881.

DISMISSAL WITHOUT PREJUDICE—COURT'S DISCRETION—EVIDENCE.—1. Where a plaintiff, upon a jury, after the testimony had been closed, the arguments made and the instructions finished, but before the bailiff had been sworn or the jury left the box, applied for leave to dismiss his action without prejudice and the court gave such leave: *Held*, that whether plaintiff had then absolute right to dismiss without prejudice, the court had a discretionary power to permit such a dismissal, and having exercised that power, its ruling was conclusive in any collateral inquiry, and the merits of the plaintiff's cause of action might be again inquired into. 2. Where the language of a written contract is not entirely perspicuous, is susceptible of two constructions, one showing an agreement apparently fair and reasonable and the other terms highly favorable to the party preparing the writing and not likely to be knowingly accepted by the other party: *Held*, that parol testimony is admissible of the prior parol negotiations, the situation and admissions of the parties for the purpose of determining in what sense the language of the written instrument was used by them. Reversed. Opinion by BREWER, J.—*Mason v. Ryus.*

LIBEL — PRIVILEGE — REPORT TO GRAND LODGE OF ODD FELLOWS.—1. Where a report is made to the Grand Lodge of the Independent Order of Odd Fellows of Kansas, in accordance with the usual rules, regulations and customs of the order, by a member of the special committee thereof, to whom was referred a petition respecting the expulsion of a member of the order, from a subordinate lodge, justifying the subordinate lodge in expelling the member for perjury, and setting forth that the officers of the subordinate lodge were unanimously of the opinion that the statement sworn to by such member in a petition presented by him to the Grand Lodge, were all infamously untrue, is received and adopted by the Lodge, in the usual course of its business, and thereafter is printed and published in a pamphlet entitled "The Grand Lodge Journal, 1873," in connection with the general and ordinary transactions of the Lodge, and in the usual manner of printing and publishing the journal of the records and proceedings of the lodge, for the use of the members of the order, such publication is *prima facie* privileged. In such a case the occasion and manner of the publication prevent the inference of malice, which the law draws from unauthorized communications, and afford a qualified defense depending upon the absence of actual malice. 2. Where a petition alleges that the defendant published a false and malicious libel concerning the plaintiff, setting it out, from which it appears to be *prima facie* privileged, as a report to a Grand Lodge of Odd Fellows, justifying a subordinate Lodge in expelling a member for perjury, it is not bad on objection to the introduction of evidence, but the burden of proof upon the trial, as to whether the defendant was actuated by actual malice, is upon the plaintiff. If the plaintiff gives no evidence of express malice under the allegations of such petition, the defendant is entitled to a verdict. Reversed. Opinion by HORTON, C. J.—*Kirkpatrick v. Eagle Lodge.*

STOCKHOLDERS—ARRANGEMENTS INTER SESE SECRET HOLDERS OF STOCK.—B and S were the owners upon the books of a National bank of all the capital stock thereof, but a portion of the stock held by B in his own name belonged to his minor children and one H; this secret ownership, however, was unknown to S. After a vote of the shareholders to put the bank into voluntary liquidation, he made and presented to S a writing showing, according to this estimate, assets of the bank amounting to $104,717.20, and the value per share of the stock of the bank to be $123.19; that S had six hundred shares of the value of $73,914, which, after his indebtedness to the bank, left his interest to be $21,280.56. B therein claimed two hundred and fifty shares of the capital stock of the value of $30,797.50, thus stating his interest to exceed S's by the sum of $9,516.94. It was then agreed between B and S that the indebtedness of S of $52,633.44 should be paid the bank by the surrender of the stock of S at $123.19 per share, in sufficiene amount to equal the indebtedness, and that S, to make his interest equal to B's, should buy sufficient stock of B at the value of $139 per share to make the interest of both in the bank equal. After this arrangement had been carried out by S, and B, C & Co. purchased of S his interest in the bank, with the understanding with B that by such purchase, the stock in the bank would be owned by B and themselves in equal amounts. *Held*, that the contract and arrangement between B and S, and C & Co. and B are binding and valid upon B, subject, of course,

to the control of the Government and the rights of creditors. Also, *Held*, that the contract and arrangement are likewise valid and binding upon such of the owners of the capital stock as was held by B in his own name, and of which secret trust neither S nor C & Co. had notice. Modified. Opinion by HORTON, C. J.—*Borland v. Clark.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES ANSWERED.

Query 53. [13 Cent. L. J. 398.] A, a traveling man for a mercantile establishment in Lucas County, Ohio, while on a business trip for the house, having the power to do so, collects money of a creditor of the firm in Michigan, does not report it, but appropriates it to his own use, flees to Canada, and subsequently goes to New York, where he is arrested and brought to Ohio, being in Lucas County for the first time since leaving on the business trip. Where is he triable? Have Lucas County, Ohio, courts, jurisdiction of his crime? R K.
Toledo, Ohio.

Answer. The offense of embezzlement can only be tried in the county where committed. There must be both a receipt and appropriation of the money to the servant's use to constitute the offense. If both these acts occurred in Michigan, then Ohio courts have no jurisdiction in the case. 2 Russ. on Crimes, secs. 471-472; 25 Ohio St. 162; 2 Bish. Crim. Procd., sec. 326; 3d Bos. & Pul. Michigan statutes alone will determine whether the facts constitute an offense in that State.
Akron, O. E. W. STUART.

Query 49. [13 Cent. L. J. 380.] A conveys real estate to "B, C and D, executive committee (of a specified secular corporation)," "granting, bargaining, selling, conveying and confirming unto said parties of the second part, their heirs, successors and assigns forever, said real estate. To have and hold said premises unto the said B, C and D, executive committee (of said corporation), their heirs, successors and assigns." Afterwards, "B," C and E, executive committee (of said corporation), convey said premises to S, in which deed "B, C and E, executive committee as aforesaid, for themselves and their successors, covenant * * * * that they are lawfully seized in their own right as such committee of said real estate." Signed, B, chairman; C, treasurer; E. secretary. The officer taking the acknowledgment certifies that before him "came B, C and E, being the board of executive committee of (said corporation), and duly acknowledged the execution of this deed." * * * * Now, granted that the records of said corporation show that at the date of the first deed, B, C and D, and at the date of the second deed, B, C and E were such executive committee; granted, also, that B, C, D and E were married men, and that the parties and premises and conveyances were in, and subject to the laws of Kansas,—where is the title to said real estate? Give authorities. J.
Topeka, Kan.

Answer. The deed of A to B, C and D, executive committee, etc., carried A's title to B, C and D as individuals clothed, perhaps, with a trust for the corporation, but not to the corporation itself. To have carried to the corporation, it should have been named as grantee. Ch. 23, sec. 11, Dass Comp. Laws. The deed of B, C and E, executive committee, etc., would not carry the title of the corporation to S, supposing it to have acquired the title by A's deed to B, C and D. The conveyance of a secular corporation must be signed by the president, or presiding member or trustee thereof, and sealed with the common seal of such corporation. Ch. 22, sec. 4, Dass. Comp. Laws; 6 Kan. 27, and cases cited in briefs and opinion. The covenants of the deed of B, C and D are then personal covenants, not the covenants of the corporation. The words executive committee, etc., in each of the deeds, and the titles after their signatures, would be "*descriptio personæ*." Treating A's deed as carrying the title to B, C and D as individuals, the deed of B, C and E to S, would carry B and C's title to D, leaving D's interest and the dower rights of B and C's wives still in the land, E would be an interloper,
XENOPHON.

RECENT LEGAL LITERATURE.

ADAMS EQUITY. The Doctrine of Equity. A Commentary on the Law as Administered by the Court of Chancery. By John Adams, Jun., Esq., Barrister-at-Law. Seventh American Edition. Containing the notes to the previous editions by J. R. Ludlow, J. M. Collins, Henry Wharton, G. T. Bispham, and George Sharswood, Jr., with additional notes and references to recent English and American Decisions. By Alfred I. Phillips. Philadelphia, 1881: T. & J. W. Johnson & Co.

This book has been long and favorably known to the profession both in this country and in England, and consequently there is no need for any specifically critical discussion of it by us now. Its original text comprises the substance, with slight additions of three series of lectures, delivered before the Incorporated Law Society in the years 1842-5 and was first published, we believe, in 1849. It is interesting to note the clear conception and comprehensive grasp of the whole scheme of equity jurisprudence, which enabled a man writing in that day and generation to so state its doctrines, that after all the change and marvellous development which they have undergone, the original bare text is still, after the lapse of nearly forty years, sufficiently in harmony with the modern cases to form the appropriate framework upon which they are presented to the profession, all the while remaining in undiminished favor though less notable perhaps than some of the modern lights. Of course much of the matter is of necessity antiquated, particularly those portions which relate to the later English statutes that have not become a part of the common law of this country, but the cardinal principles of the system which underlie all its doctrines are clearly

and compactly expressed. The book is printed in large clear type, and is very satisfactory in appearance.

BAYLIES ON SURETIES AND GUARANTORS.—A Treatise on the Rights, Remedies and Liabilities of Sureties and Guarantors, and the Application of the Principles of Suretyship to Persons other than Sureties, and to Property Liable as Surety for the Payment of Money. By Edwin Baylies, Counselor at Law. New York, 1881: Baker, Voorhis & Co.

The topic, which is the subject of this volume, constitutes a very important, though not very well defined, branch of the law. The treatment which it has heretofore received has not, in our opinion, been commensurate with its importance, or with the frequency with which questions arising from it are litigated. The adjudicated cases upon it are so numerous and so conflicting in their nature that any treatment that was not, to a certain extent, philosophical in its character, would be practically useless. A mere collection of the cases upon this topic, in the style in which many of the so-called text books are written, would present such a mass of contradiction and incongruity as to bewilder rather than instruct the reader. In this branch of jurisprudence, too, after the foundation is laid in the establishment of a few general doctrines, the determination of the principles applicable to each case, must depend, to a great extent, upon the special facts involved; and, consequently, the treatment seems upon a casual examination to be more expanded than it is. The author, in the preface, disclaims any pretension to have cited all the cases decided, or even that other cases might not have been cited with advantage. We are inclined to agree with him, however, in his claim that the 3,000 cases which are cited are well and carefully chosen, and present an accurate view of the current of authority. Altogether the work, while making no pretensions to being a great law book, will, we are confident, be found to be an useful one.

NOTES.

——When John Toler, Lord Norbury, sat at Nisi Prius, his constant fire of puns—the repartees of the bar, and applause of the spectators—often raised a terrible din. A witness being asked "what his business was?" replied, "I keep a racket court." Lord Norbury instantly exclaimed, "So do I! so do I!"——One of the happiest *bon mots* of the Chief Justice of the Common Pleas was uttered when Dr. Troy was Roman Catholic Archbishop of Dublin. The Archbishop constantly entertained the leading members of the famous Catholic Association, and among then Mr. Æneas MacDonnell. This gentleman happened to be leaving the dinner party at the Archbishop's, when Lord Norbury was passing with a friend. "There goes the ancient warrior," whispered the punster to his friend. "Who do you mean?" was the inquiry. "The pious Æneas returning from the Sack of Troy."——Lord Norbury had a testy neighbor in the country near Phibsborough, whose cattle often roamed on his lordship's grounds, but when the cows of his lordship returned their visit, he was threatened with an action for damage done. To this he replied somewhat irreverently, "Forgive us our trespasses, as we forgive them that trespass against us."——Lord Norbury, walking to the court one morning, saw a crowd on the quay, near the Four Courts. He inquired the cause, and was informed "a tailor had just been rescued from attempting suicide by drowning." "What a fool," responded the Chief Justice, "to leave his hot goose for a cold duck." Riding with a friend named Spear, who was mounted on a high trotting horse, Lord Norbury said "he should call the quadruped Shakespeare." On another occasion a Mr. Pepper, being thrown from his horse, Lord Norbury inquired, "if the horse had any name?" "Yes," said the owner, we call him Castor." "And a very good name for him," replied his lordship, "but henceforth you may call him Pepper Caster."——A gentleman having boasted in his presence "of having shot seventy hares before breakfast," Lord Norbury caused a laugh by observing, very dryly, "I dare say you fired at a wig."

——The judicious course pursued by Judge Cox, in a very unusual and trying position, has brought the uneasy Guiteau to the end of the first part of the trial without the necessity of removing him from the court room. If the prosecution had been less prudent, or the judge less considerate, there might easily have been a scene very embarrassing to the result. The principles involved, however, clearly sustain the court in the position that it is not only the right but the duty of the tribunal at all hazards to preserve order and decorum. The idea that a prisoner can prevent his own trial by persisting in a contempt of court is worthy of the opera of Pinafore or the Pirates of Penzance. If this were so, there would be no better resistance to a capital indictment than mere obstreperousness. If it should become necessary to remove a prisoner for conduct rendering it impossible for the trial to proceed properly with him in the room, he should be taken out in the act of contempt, and the case should go on without him, but he should be brought back again when quiet and orderly, to be removed again when he misbehaved. Two or three lessons of this sort would in any case suffice either to cure his paroxysms or to demonstrate the necessity of continued exclusion.—*New York Daily Register.*